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In The

Supreme Court of the United States

October Term, 1994

UNITED STATES,

Appellant,

v.

RAY HAYS, et al.,

Appellees.

STATE OF LOUISIANA, et al.,

Appellants,

v.

RAY HAYS, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Louisiana

BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF LOUISIANA IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND ACLU OF LOUISIANA IN SUPPORT OF APPELLANTS

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (hereinafter "ACLU") is a nationwide, non-profit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the equal right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Holder v. Hall,* 114 S.Ct. 2581 (1994), *McCain v. Lybrand,* 465 U.S. 236 (1984), *Rogers v. Lodge,* 458 U.S. 613 (1982), *Hunter v. Underwood,* 471 U.S. 222 (1985), and as *amicus curiae, see, e.g., Davis v. Bandemer,* 478 U.S. 109 (1986). The ACLU is providing representation to the appellants in *Abrams v. Johnson,* No. 94-797, *prob. juris. noted,* 63 U.S.L.W. 3499 (Jan. 6, 1995). The ACLU of Louisiana is one of its statewide affiliates.

SUMMARY OF JUDGMENT

Affirmance of the decision below that race-conscious redistricting is always subject to strict scrutiny without regard to bizarre shape and that the state had no compelling interest in complying with the Voting Rights Act or in remedying past discrimination, would render constitutionally suspect or invalidate most of the congressional, state, and local redistricting plans in the South as well as in other parts of the nation. A generation of litigation and

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

administrative action under the Act would be set aside that Congress, national administrations of both parties, and this Court have endorsed as appropriate efforts to remedy the exclusion of minorities from the political process. Existing majority-minority districts would be invalidated and given the fact that minorities have been elected almost exclusively in majority-minority districts, legislative bodies at the national, state, and local levels would become primarily white.

The consideration of race in redistricting is not *per se* suspect and is different from the consideration of race in the allocation of scarce employment or contractual opportunities where an independent claim of entitlement exists. Any racial group may complain if its voting strength has been abridged, but a non-dilutive race-conscious redistricting plan injures no one. Congress has sanctioned the use of majority-minority districts and has concluded that they do not isolate voters or increase racial tension.

ARGUMENT

I. Affirmance Would Radically Alter the Established Understanding and Application of the Voting Rights Act

Affirmance of the decision of the three judge court that "[r]ace-conscious redistricting . . . is always subject to strict scrutiny," *United States v. Hays*, No. 94-558, Jurisdictional Statement Appendix at 5a (hereinafter "App."), would call into question the constitutionality of many, if not virtually all, of the redistricting plans – congressional, state, and local – currently in existence in the southern states targeted by the special preclearance provisions of

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.[2] The existing plans, or those upon which they were based, invariably took race into account in creating majority-minority districts: (1) to remedy violations of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973; (2) as a settlement in Section 2 vote dilution law suits; (3) to resolve Section 5 objections by the Attorney General; (4) voluntarily to comply with the Voting Rights Act; or, (5) to insure racial inclusiveness in the affected legislative bodies.

While these plans would survive strict scrutiny under the existing precedents of this Court, assuming strict scrutiny were required because of the bizarre shape of any of the districts, many would be held unconstitutional under the analysis of the three judge court that Louisiana had "no compelling governmental interest" in complying with Sections 2 and 5 of the Voting Rights Act or in remedying past and continuing discrimination. App. at 6a-7a. Under the circumstances, affirmance would make subject to challenge the results of a generation of litigation and administrative action under Section 5 that successive Congresses, national administrations of both parties, and this Court have strongly endorsed as appropriate efforts to remedy the historic exclusion of racial minorities from the political process in the United States.

A. *Congressional Redistricting.* In the 1980s, majority black congressional districts were intentionally drawn in a number of the southern states to remedy discrimination in the redistricting process and to combat the chronic effects of racial bloc voting. In Louisiana, the majority black Second District was created in 1983 as a result of

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[2] The covered states, or portions thereof, are Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. 28 C.F.R. § 51 (1991).

Section 2 litigation. A three judge court invalidated the state's previous plan because it "sunder[ed]" the black population in the New Orleans area into two districts, ensuring the blacks would be a majority in neither. *Major v. Treen*, 574 F. Supp. 325, 352 (E.D.La. 1983). The state enacted a race conscious remedial plan which contained a district that was 58.6% black, the Second, located wholly within the city of New Orleans. Richard L. Engstrom, Stanley A. Halpin, Jr., Jean A. Hill, and Victoria M. Caridas-Butterworth, "Louisiana," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990* 120 (eds. Chandler Davidson and Bernard Grofman, 1994) (hereinafter *Quiet Revolution*).[3]

The Second District enhanced the opportunity of blacks to elect a candidate of their choice, but it was not a "safe" black district. Lindy Boggs, the white incumbent, defeated a black state court judge, Israel Augustine, in the 1984 election. Boggs retained the seat until she retired in 1990, whereupon William Jefferson, a black, was elected as her successor. *Id.*

In its 1990 congressional plan, Louisiana continued the majority black Second District basically in its 1983 form. The new Second "covers essentially the same geographic area as did old District 2 in the previous plan," and is 61% black. *Hays v. State of Louisiana*, 839 F. Supp. 1188, 1191, 1210 (W.D.La. 1993), *vacated and remanded on*

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[3] *Quiet Revolution*, a collaborative effort by 27 social scientists, historians, and lawyers funded by the National Science Foundation, is the most comprehensive and systematic study to date of the impact of the Voting Rights Act in the southern states covered in whole or in part by Section 5.

other grounds sub nom. Louisiana v. Hays, 114 S.Ct. 2731 (1994).[4]

Georgia's majority black Fifth Congressional District was created in 1982 after the three judge court for the District of Columbia denied Section 5 preclearance to the state's initial plan because of "conscious minimizing of black voting strength" in the metropolitan Atlanta area. *Busbee v. Smith,* 549 F. Supp. 494, 517 (D.D.C. 1982), *aff'd,* 459 U.S. 1166 (1983). The state accomplished the "minimizing" by splitting the black community into three separate congressional districts, insuring that blacks were a minority of voters in each district. 549 F. Supp. at 499.

To remedy the Section 5 objection, the state drew a new plan which deliberately concentrated the black community in the Atlanta area into a single district, the Fifth. Although the district was approximately 65% black, it was not a guaranteed or "ghetto" district for blacks as its critics claimed. 549 F. Supp. at 507. Wyche Fowler, a white Democrat, was elected from the district in 1982 and in 1984. Michael Barone and Grant Ujifusa, *The Almanac of American Politics 1984* 289 (1983); Barone, *supra, The Almanac of American Politics 1986* 345 (1985). Fowler ran for the Senate in 1986, at which time John Lewis, a black Democrat, was elected to the open Fifth District seat. Barone, *supra, The Almanac of American Politics 1988* 300 (1987).

In its 1990 congressional redistricting plan, Georgia made the decision to maintain the Fifth as a majority black district in the metropolitan Atlanta area. While the

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[4] In its 1994 decision invalidating the majority black Fourth District, the three judge court approved the Second, noting that "[a] strong basis under *Gingles* does exist . . . to warrant the creation of a majority-minority district in the Orleans Parish region, where one has existed since 1983." Hays v. State of Louisiana, No. 92-1522 (W.D.La. July 29, 1994), App. at 9a n.5.

redistricting process was driven by a number of factors, the state's redistricting criteria included protecting incumbents, avoiding retrogression under Section 5, and preserving the core of existing districts. *Johnson v. Miller*, No. 194-008 (S.D.Ga. Sept. 12, 1994), slip. op. at 5, *prob. juris. noted sub nom. Abrams v. Johnson*, 63 U.S.L.W. 3499 (Jan. 6, 1995).

In Mississippi a majority black congressional district, the Second, was first created in 1984 as the result of Section 2 litigation. In finding a violation the three judge court noted that, because of racially polarized voting, blacks had an "unrealistic chance . . . to be elected in majority white voting population districts." *Jordan v. Winter*, 604 F. Supp. 807, 813 (N.D.Miss. 1984), *aff'd sub nom. Mississippi Republican Executive Committee v. Brooks*, 469 U.S. 1002 (1984).

The court adopted an interim court ordered plan under which the Second District was 58.3% black. 604 F. Supp. at 814. The court acknowledged that its plan "does not provide a compact geographical configuration for the Second District." 604 F. Supp. at 815. However, it justified the plan on racial grounds, *i.e.*, it created a rural Delta-River district "with a black voting age population majority," and had "the least adverse impact on the black voting influence in the Fourth District." *Id.* at 814-15.

The Mississippi Second was not a "safe" or "segregated" black district. At the 1984 election, Webb Franklin, a white, won the seat defeating black state legislator Robert Clark. Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi after 1965* 91 (1990) (hereinafter *Black Votes Count).* Mike Espy, a black lawyer with roots in the Delta area, ran in 1986 and was elected, the first black member of Congress from Mississippi in this century. *Id.* In its 1990 redistricting plan, the state

retained the Second as a majority black district composed of Delta and river counties. U.S. Census, *1990 Population and Housing Profile*; "Congressional District of the 103rd Congress," *C.O. Weekly Report*, V. 51, 3473, 3487 (hereinafter *Congressional Districts of the 103rd Congress*).

In the 1990s majority black congressional districts were intentionally drawn in Alabama, South Carolina, and Florida. In *Wesch v. Hunt*, 785 F. Supp. 1491, 1493 (S.D.Ala. 1992), *aff'd sub nom. Camp v. Wesch*, 112 S.Ct. 1926 (1992), *Figures v. Hunt*, 113 S.Ct. 1233 (1993), the plaintiffs challenged the pre-existing plan in Alabama, under which all the districts were majority white, on one person, one vote and Section 2 vote dilution grounds. During the course of the litigation, the parties stipulated "that a significant majority African American Congressional district should be created." 785 F. Supp. at 1498. The three judge court accepted the stipulation without making a finding whether Section 2 required the creation of a majority black congressional district in Alabama, and adopted a court ordered plan containing a district, the Seventh, in which blacks were 67.5% of the population. 785 F. Supp. at 1581.

Similarly, in South Carolina plaintiffs challenged the state's congressional redistricting plan on one person, one vote and Section 2 grounds. *Burton v. Sheheen*, 793 F. Supp. 1329, 1367-69 (D.S.C. 1992).[5] The state conceded a one person, one vote violation and the parties agreed that any remedial plan should include a majority black congressional district.

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[5] Plaintiffs also challenged redistricting for the state house and senate. Plaintiffs appealed the court ordered plans for these two legislative bodies on the grounds that the three judge court failed properly to consider Section 2. This Court reversed and remanded *sub nom.* SRAC v. Theodore, 113 S.Ct. 2954 (1993).

In implementing a court ordered remedy, the court drew a majority black district, the Sixth, but without deciding "if the court was *required*, under existing legal principles, to create a majority-minority district." 793 F. Supp. at 1368. The court acknowledged that its districts "may stretch the concept of compactness," but justified its plan "[f]irst, and foremost," because it ensured compliance with the Voting Rights Act. 793 F. Supp. at 1368.

In Florida two majority black congressional districts (the Third and the Seventeenth), and a third minority congressional district (the Twenty-third) in which blacks and Hispanics combined were the majority, were intentionally drawn by a three judge court as a result of voting rights litigation. *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1088 (N.D.Fla. 1992). Finding that the pre-existing plan violated the one person, one vote rule as well as Section 2, the three judge court implemented race conscious redistricting to ensure that its "plan does not dilute the votes of racial or language minorities." 794 F. Supp. at 1083.[6]

During the 1990s a combination of voluntary state action and Section 5 objections or threatened objections by the Attorney General also resulted in the intentional creation of majority-black districts. Louisiana drew a second majority black district (the fourth), under the "impression" that the Attorney General would not preclear a plan that did not include two majority black districts out of seven. *Hays v. State of Louisiana, supra*, 839 F. Supp. at 1196 n.21.[7] In Georgia, prior to any involvement by the Department of Justice, state

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[6] The Florida congressional plan has been challenged on constitutional grounds in Johnson v. Smith, No. 94-40025 WS (N.D. Fla.).

[7] As noted *supra* at n.4, the three judge court invalidated the Fourth District on equal protection grounds, but approved the race conscious majority black Second District.

officials made the decision to create a second majority black congressional district in addition to the existing Fifth. *Johnson v. Miller, supra,* slip op. at 21-2; Transcript Volume II, 113 (Testimony of Meggers). Following Section 5 objections by the Attorney General to its first two plans, the state created two new majority black congressional districts (the Second and the Eleventh).[8]

North Carolina voluntarily drew a majority black district following the 1990 census. *Shaw v. Reno,* 113 S.Ct. 2816, 2819 (1993). After a Section 5 objection by the Attorney General, the state drew two majority black districts, the First and the Twelfth. 113 S.Ct. at 2820.[9] The threat of litigation or objections to preclearance by civil rights organizations were factors in the intentional creation of a second majority black district in Texas (the Thirtieth), *Vera v. Richards,* 1994 WL 484492 (S.D. Tex. Aug. 17, 1994),[10] and one in Virginia (the Third).[11]

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[8] The court in Johnson v. Miller, *supra,* slip op. at 1, invalidated the challenged Eleventh District on the ground that it violated the equal protection clause of the Fourteenth Amendment.

[9] White voters challenged the plan on constitutional grounds in Shaw v. Barr, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd sub nom.* Shaw v. Reno, *supra.* On remand, the three judge court sustained the plan's constitutionality. Shaw v. Hunt, 1994 WL 457269 (E.D.N.C. Aug. 1, 1994, as amended Aug. 22, 1994).

[10] The court noted the testimony of George Korbel, director of litigation for Texas Rural Legal Aid and former regional director of the Mexican-American Legal Defense Fund, before a senate committee that unless an additional black congressional district were created "the reapportionment of the Congress is not going to pass the Department of Justice." *Id.,* slip op. at 17-8. The court invalidated portions of the Texas plan on equal protection grounds.

[11] Both the NAACP and ACLU indicated they would challenge the state's plan if the Governor "didn't increase black

If the mere fact of race-conscious redistricting, without regard to the bizarre shape of the district, is always subject to strict scrutiny, then every one of the congressional plans in the southern states covered by Section 5 would be constitutionally suspect. In addition, many if not all congressional plans in other regions containing majority-minority districts would similarly be presumptively invalid.

Nationwide, the number of majority black and Hispanic congressional districts doubled after the 1990 census from 29 to 52. U.S. Department of Commerce News, U.S. Bureau of the Census, Press Release, "Number of Congressional Districts with Black or Hispanic Majorities Doubles, Census Bureau Says," Revised, March 24, 1993; "Black-and-Hispanic-Majority Districts," *C.Q. Weekly Report*, July 10, 1993. Race can easily be identified as a factor in the construction of many of the districts located outside the South. *See, e.g., Hastert v. State Board of Elections*, 777 F. Supp. 634, 662 (N.D.Ill. 1991) (approving a congressional plan for Illinois creating "an Hispanic super-majority district" and preserving "three existing African-American districts"); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 689 (D.Ariz. 1992) (creating one new majority-Hispanic district on the ground that it "comports with the requirements of the Voting Rights Act," and deliberately assigning Hopi and Navajo to different congressional districts); *Wilson v. Eu*, 1 Cal.4th 707, 823 P.2d 545, 550 (Cal. 1992) (creating five new majority-

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voting strength in the 3rd District." "NAACP and ACLU oppose redistricting plan," *The Virginian-Pilot*, November 22, 1991, D5; Bill Wasson, "Wilder plan expected to win Assembly OK," *The Richmond News Leader*, December 3, 1991, 1.

Hispanic congressional districts); *Mellor v. Mitchell*, 607 A.2d 204, 219 (Pa. 1992) (creating one new majority black congressional district).

B. *Legislative Redistricting.* Following passage of the Voting Rights Act, majority black state legislative districts were also deliberately created throughout the South. Two primary factors drove this process. First, states were required by the courts and/or Section 5 to abandon their use of multi-member districts, at least in areas with substantial black populations, in favor of single member systems.[12] Courts and/or Section 5 objections invalidated, generally on minority vote dilution grounds, multi-member legislative districts in Alabama,[13] Georgia,[14] Louisiana,[15] Mississippi,[16]

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[12] Single member districts facilitate the construction of districts in which a minority is in the majority, and, as this Court has consistently recognized, enhance the minority's chances of electing candidates of its choice. Rogers v. Lodge, 458 U.S. 613, 616 (1982) (a minority "unable to elect any representatives in an at-large election, may yet be able to elect several representatives if the political unit is divided into single-member districts"); Voinovich v. Quilter, 113 S.Ct. 1149, 1155 (1993).

[13] Sims v. Amos, 336 F. Supp. 924, 936 (M.D.Ala. 1972) ("multi-member districts tend to discriminate against the black population"), *aff'd* 409 U.S. 942 (1972).

[14] Georgia v. United States, 411 U.S. 526, 530 (1973) (noting the Attorney General's objection to multimember districts because of their potentially "discriminatory racial effect on voting").

[15] Bussie v. Governor of Louisiana, 333 F. Supp. 452, 454 (E.D.La. 1971) (expressing approval of the Attorney General's objection to the state's plan, which contained multimember districts, and describing it as "racially discriminatory" and "employing gerrymandering in its grossest form"); Bussie v. McKeithen, 457 F.2d 796 (5th Cir. 1971).

[16] Connor v. Coleman, 425 U.S. 675 (1976); Connor v. Finch, 419 F. Supp. 1072, 419 F. Supp. 1089, 422 F. Supp. 1014 (S.D.Miss. 1976).

North Carolina,[17] South Carolina,[18] Texas,[19] and, Virginia.[20]

Second, states were required, again by the courts and/or Section 5, to draw district lines in a racially conscious manner to avoid diluting minority voting strength. *See* Lisa Handley and Bernard Grofman, "The Impact of the Voting Rights Act on Minority Representation: Black Office Holding in Southern State Legislatures and Congressional Delegations," in *Quiet Revolution* at 340 (states were required to change "from multimember to single-member districts" and "to redraw . . . lines so as not to fragment black voters").

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[17] Gingles v. Edmisten, 590 F. Supp. 345, 350-51 (E.D.N.C. 1984) (noting the Attorney General's objections to multimember districts in covered areas of the state), *aff'd sub nom.* Thornburg v. Gingles, 478 U.S. 30, 80 (1986) ("use of a multimember electoral structure [in uncovered areas] has caused black voters . . . to have less opportunity than white voters to elect representatives of their choice").

[18] U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After 217 (1975) (noting the Attorney General's objection to multimember districts in the house because of their tendency to submerge "significant concentrations" of black voters). After extensive litigation and Section 5 proceedings, *see* Morris v. Gressette, 432 U.S. 491, 495 n.4, 498 (1977), and South Carolina v. United States, 589 F. Supp. 757 (D.D.C. 1984), the senate adopted single member districts in 1984. Laughlin McDonald, "An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina," 37 S.C.L.Rev. 557, 578 (1986).

[19] White v. Regester, 412 U.S. 755, 773 (1973) (multimember districts "had the unconstitutional effect of minimizing the voting strength of racial groups") (Brennan, J., concurring).

[20] In the 1980s, following Section 5 objections by the Attorney General, the state adopted single member districts for both the house of delegates and the senate. Thomas R. Morris and Neil Bradley, "Virginia," in *Quiet Revolution* at 281-82.

Throughout the 1970s, 1980s, and 1990s, the Department of Justice repeatedly objected under Section 5 to the way lines were drawn in legislative redistricting plans in covered jurisdictions, whether they used multimember or single member districts. *See* U.S. Department of Justice, *Complete Listings of Objections Pursuant to Section 5 of the Voting Rights Act of 1965*, November 30, 1994 (hereinafter *Complete Listings of Section 5 Objections*). Since April 1, 1991 (through December 22, 1994), the Attorney General has objected to redistricting in Florida (senate), Georgia (house and senate), Louisiana (house and senate), Mississippi (house and senate), North Carolina (house and senate), South Carolina (house), Texas (house and senate), and Virginia (house). *Id.* Necessarily, race conscious remedial plans were drawn to cure the Section 5 objections. *See, e.g., Johnson v. De Grandy*, 114 S.Ct. 2647, 2652 N.2, 2663 (1994) (approving a plan which created "effective voting majorities" for blacks and Hispanics).[21]

C. *Local Redistricting.* The same pattern of remedial race-conscious post-Voting Rights Act redistricting is repeated in southern cities and counties. In Alabama, for example, between 1970 and 1989, 42 of the 48 cities with populations of 6,000 or more switched from at-large to district systems of elections. Peyton McCrary, Jerome A. Gray, Edward Still, and Huey L. Perry, "Alabama," in *Quiet Revolution* at 55. Vote dilution litigation caused 27

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[21] Race-conscious legislative redistricting is commonplace outside the South as well. *See, e.g.*, DeWitt v. Wilson, 1994 WL 325414 (E.D.Cal. 1994) (approving the creation of majority-minority legislative districts in California); Voinovich v. Quilter, *supra*, 113 S.Ct. at 1153 (approving the creation in Ohio of "several legislative districts dominated by minority voters").

of the changes, and Section 5 objections by the Attorney General another four.[22]

There was also a substantial shift by counties and school boards in Alabama from at-large to alternative systems. As with cities, vote dilution litigation was the main cause for the changes. *Dillard v. Crenshaw County, Ala.*, 640 F. Supp. 1347 (M.D.Ala. 1986); *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459, 1461 (M.D.Ala. 1988); McCrary, *supra*, in *Quiet Revolution* at 54.

All of the remedial plans adopted in Alabama since passage of the Voting Rights Act may fairly be characterized as race-conscious. If race-conscious redistricting is always subject to strict scrutiny, virtually every one of these plans is constitutionally suspect and subject to immediate review by the federal courts.

In Georgia, as another example, vote dilution lawsuits were filed against 40 cities and 57 counties in the state between 1974-1990 challenging systems of at-large elections. Laughlin McDonald, Michael B. Binford, and Ken Johnson, "Georgia," in *Quiet Revolution* at 81. All but one of the cities, and 53 of the counties, changed to district systems containing majority black districts as a result of the litigation. Without question, all of the remedial redistricting plans, whether drawn by the courts or agreed upon by the parties, were race conscious, *i.e.*, districts were designed to contain "effective black voting majorities." *Id.* at 90.

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[22] Even the so-called "voluntary" changes often reflected direct awareness of the Voting Rights Act. The city of Attala, in adopting a single member plan in 1988, indicated that it was "sensitive to the Sec. 5 Preclearance Requirements of the Voting Rights Act." Attala City Council, Ordinance No. 612 (88); McCrary, *supra*, in *Quiet Revolution* at 409 n.146.

The chief demographer for the State of Georgia, who has drawn hundreds of redistricting plans at the state and local levels over the past two decades in the course of litigation or simply to comply with one person, one vote, testified in *Johnson v. Miller, supra,* that she had "never drawn a redistricting plan . . . that didn't take race into account." *Id.* at Transcript Volume II, 265 (Testimony of Meggers). She frankly conceded that "if taking race into account were unlawful . . . there is not a redistricting plan in the State of Georgia that would be valid." *Id.*

Scores of race-conscious local redistricting plans were similarly drawn in response to litigation or to comply with the Voting Rights Act in Louisiana,[23] Mississippi,[24] North Carolina,[25] South Carolina,[26]

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[23] *See* Engstrom, *supra,* in *Quiet Revolution* at 112-14 (describing the adoption of majority black districts in cities and parishes in response to Section 5 objections or litigation).

[24] *See* Frank Parker, David C. Colby, and Minion K.C. Morrison, "Mississippi," in *Quiet Revolution* at 138-39 (describing changes by cities between 1965 and 1989 from at-large to district based elections as a result of litigation or Section 5 objections). The attempt in Mississippi to *avoid* creating majority black districts in counties containing substantial black populations by changing from single member districts to at-large elections is discussed in Parker, *supra, Black Votes Count* at 51-54. *Also see* Allen v. State Board of Elections, 393 U.S. 544, 550 (1969) (requiring preclearance of Mississippi's post-Voting Rights Act law authorizing counties to adopt at-large voting).

[25] *See* William R. Keech and Michael P. Sistrom, "North Carolina," in *Quiet Revolution* at 171-72 (noting substantial changes from at-large to district elections and the creation of majority-minority districts for counties and cities in North Carolina between 1965 and 1991 induced by litigation, the threat of litigation, or voluntary compliance with the Voting Rights Act).

[26] *See* Orville Vernon Burton, Terrence R. Finnegan, Peyton McCrary, and James W. Loewen, "South Carolina," in *Quiet*

Texas,[27] and Virginia.[28] Nationwide, since April 1, 1991 (through December 22, 1994), the Attorney General has objected to 148 redistricting plans adopted in Alabama, Arizona, California, Georgia, Louisiana, Mississippi, New York, South Carolina, Texas, and Virginia. *Complete Listings of Section 5 Objections, supra.*

As is apparent, subjecting a plan to strict scrutiny merely because the jurisdiction took race into account or intended to create a majority-minority district would radically alter this Court's established interpretation and application of the Voting Rights Act. While *stare decisis* is not "an inexorable command," it

> is the preferred course because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Payne v. Tennessee, 111 S.Ct. 2597, 2609 (1991). Affirmance would violate each and everyone of these concerns, and would extend *Shaw v. Reno* in a way this Court could not have contemplated.

Revolution at 207-12 (describing changes from at-large to race-conscious district elections for local jurisdictions in South Carolina brought about by litigation, Section 5 objections, and voluntary compliance with the Voting Rights Act).

[27] *See* Robert Brischetto, David R. Richards, Chandler Davidson, and Bernard Grofman, "Texas," in *Quiet Revolution* at 254-55 (discussing substantial changes from at-large to district elections for cities caused by litigation, the threat of litigation, or Section 5 objections.

[28] *See* Morris, *supra,* in *Quiet Revolution* at 284-85 (noting the creation of majority black districts for a number of counties and cities as a result of litigation or Section 5 objections).

II. The Consideration of Race in Redistricting Is not Inherently Suspect

The notion that race-conscious redistricting is stigmatizing, App. at 11, and should always be subject to strict scrutiny ignores the reality of the redistricting process. *See United Jewish Organizations of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 165 (1977) (racial redistricting represents "no racial slur or stigma with respect to whites or any other race") (White, J., joined by Stevens and Rehnquist, JJ.). Legislators routinely make decisions in redistricting based on group characteristics, such as race and ethnicity. As the Court noted in *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), "it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another." *See Mobile v. Bolden*, 446 U.S. 55, 87 (1980) ("legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way") (Stevens, J., concurring in judgment); *United Jewish Organizations of Williamsburg, Inc. v. Carey, supra*, 430 U.S. at 176 n.4 ("[i]t would be naive to suppose that racial considerations do not enter into apportionment decisions") (Brennan, J., concurring). *See also* Allan J. Lichtman and J. Gerald Hebert, "A General Theory of Vote Dilution," 6 *La Raza L.J.* 1, 21 (1993) (redistricting authorities well know "[t]he relative locations of concentrations of minorities as well as their political proclivities"); T. Alexander Aleinkoff and Samuel Issacharoff, "Race and Redistricting: Drawing Constitutional Lines after *Shaw v. Reno*," 92 *Mich.L.Rev.* 588, 607 (1993) ("[g]iven that racially polarized voting patterns are well documented, race and ethnicity will invariably be crucial demographic variables in redistricting decisions").

One of the essential purposes of legislative redistricting is to "reconcile the competing claims of political, religious, ethnic, racial, occupational and socioeconomic groups." *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring in the judgment). In *Arizonans for Fair Representation v. Symington, supra*, 828 F. Supp. at 690, for example, in fashioning a remedy the court deliberately placed Hopi and Navajo Indians in different districts because the tribes "did not want to be placed in the same district."[29]

The lower court in this case recognized that group characteristics, specifically religion and ethnicity, could properly form the basis for redistricting decisionmaking. In fact, it invalidated the Fourth District in part because it failed to take into account the "ethno-religious" divisions of the state and failed to place in separate districts "English-Scotch-Irish, mainline Protestants, traditional rural black Protestants, South Louisiana black Catholics, Continental French-Spanish-German Roman Catholics, sui generic Creoles, and thoroughly mixed polyglots." App. at 66a. To hold on the one hand that a plan is invalid because it failed to take the ethnicity of "English-Scotch-Irish" or "sui generic Creoles" into account, but to hold on the other that a plan is suspect because it took the race of African-Americans into account would impose an impermissible dual standard in redistricting and render the equal protection clause virtually meaningless.

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[29] The Census Bureau, of course, collects and widely disseminates bloc data by race under Pub.L. 94-171, 13 U.S.C. § 141(c). Although the statute does not mandate race data, it is provided because states request it for redistricting and for other governmental purposes. Congress and the states thus recognize that race is inherent in the redistricting process.

To be sure, a minority (whether black or white) in a district may always challenge a redistricting plan on statutory or constitutional grounds if its voting strength has been diluted. In such a challenge the plaintiffs would have the burden of proving that the plan was purposefully discriminatory, *Rogers v. Lodge, supra,* or had a discriminatory result. *Thornburg v. Gingles, supra.* But that is far different from holding that in the absence of proof of a discriminatory purpose or result a plan is constitutionally suspect merely because race was a factor in the redistricting process.

In *Thornburg v. Gingles, supra,* 478 U.S. at 50, the Court held that in proving a violation of Section 2, race *must* be taken into account in proposing an alternative redistricting plan to show that a minority could constitute a majority in a single member district. It would be irrational, and would amount to repeal of Section 2, to hold that a plan drawn to comply with *Gingles* was itself a constitutionally suspect racial gerrymander because it took race into account in showing that a minority was geographically compact.

Moreover, in *Holder v. Hall,* 114 S.Ct. 2581 (1994), a majority of the Court affirmed the continuing validity of Section 2 and rejected the contention that the Court's race-conscious Section 2 vote dilution jurisprudence was "repugnant to . . . the ideal of a color-blind Constitution." 114 S.Ct. at 2598 (Thomas, J., concurring in the judgment). *Id.* at 2588 ("*stare decisis* concerns . . . require me to reject Justice THOMAS' suggestion that we overhaul our established reading of § 2") (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2621 n.3 (the *Gingles* vote dilution analysis applies to "the case before us") (Blackmun, J., dissenting); *id.* at 2627 ("[i]t is crystal clear that Congress intended the 1982 amendment to

cover non-access claims like those in *Bolden* and *Gomillion*) (Stevens, J., dissenting).

Under a non-dilutive race-conscious redistricting plan, whites are not injured and do not have an independent claim of entitlement, *e.g.*, to be overrepresented in a legislative body or to live in a district in which members of their race are the majority. It is the absence of harm that principally distinguishes redistricting cases from those involving the race conscious allocation of scarce employment or contractual opportunities to which strict scrutiny has been held to apply.

In *Wygant v. Board of Education*, 476 U.S. 276 (1986), preferential layoffs were subject to strict scrutiny because white teachers with greater seniority were laid off while minority teachers with less seniority were retained. The Court invalidated the layoff/retention scheme because the "burden is too intrusive" on third parties. *Id.* at 283. In *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 493 (1989), a city's minority set aside was subject to strict scrutiny because it "denies certain citizens the opportunity to compete for a fixed percentage of public contracts." In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Bakke was injured because he was denied the chance to compete for all the openings in a medical school class. Certain places had been set aside for minority applicants, whom Bakke contended were less qualified than he.

In each of these cases whites were palpably injured or had an independent claim of entitlement – more seniority, acceptable bids for contracts, better qualifications – that was denied by a racial preference. But under a non-dilutive race-conscious redistricting plan, no person is injured or has an independent claim of entitlement.

In *Shaw v. Reno, supra,* 113 S.Ct. at 2826, the Court recognized that "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines." For that reason, race-conscious redistricting is subject to strict scrutiny only where it is conjoined with bizarre district shape, *i.e.,* where a plan on its face appears to be nothing more than an effort to segregate voters on the basis of race. *Id.* at 2824. *See* Richard H. Pildes and Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after *Shaw v. Reno,*" 92 *Mich.L.Rev.* 483, 495 (1993) ("*Shaw* is best read as an exceptional doctrine for aberrational contexts rather than as a . . . sweeping constitutional condemnation of race-conscious redistricting.").

III. Affirmance Would Purge Minorities from Office

Affirming the lower court in this case, *i.e.,* applying a presumption of unconstitutionality to redistricting plans in which race was a consideration without regard to bizarre shape and rejecting compliance with the Voting Rights Act and combating past and continuing discrimination as compelling governmental interests, would result in the wholesale invalidation of existing plans. It would also provide a strong disincentive for the maintenance of any existing majority-minority districts, as well as the creation of such districts in the future. These consequences would be devastating for minority office holding since minorities have been elected in the South – at the local, state, and national levels – primarily in majority-minority districts.

The principal conclusions of *Quiet Revolution* are:

> First, the increase in the number of blacks elected to office in the South is a product of the

> increase in the number of majority-black districts and not of blacks winning in majority-white districts. Second, even today black populations well above 50 percent appear necessary if blacks are to have a realistic opportunity to elect representatives of their choice in the South.

Handley, *supra,* in *Quiet Revolution* at 335-36. These findings are consistent with those of prior studies during the 1970s and 1980s comparing the success of black candidates in different election systems, which supported the common sense view that single member districts provided blacks greater electoral opportunities than at-large or multimember district systems. *See* Margaret Conway, *Political Participation in the United States* 185, 2d ed. Washington, D.C. C.Q. (1991) (summing up the scholarship and concluding that "there is persuasive evidence that the electoral structure has a significant, perhaps even dominant, impact on the extent of [minority officeholding]").

As an illustration of the findings in *Quiet Revolution,* of the 17 African-Americans elected to Congress in 1992 and 1994 from the 11 states of the old Confederacy, *all* were elected from majority-minority districts. *Congressional Districts of the 103rd Congress, supra;* "Minorities in Congress," *C.Q. Weekly Report,* Nov. 12, 1994. For minorities to win, it has almost invariably been necessary for them to run in districts with a majority-minority population.

The only black in the twentieth century to win a seat in Congress from a majority white district in one of the southern states covered by Section 5 was Andrew Young. He was elected in 1972 from the Fifth Congressional District located in the Atlanta metropolitan area and in which blacks were over 40% of the population. McDonald, *supra,* in *Quiet Revolution* at 85. Still, voting

was strongly racially polarized and he got only 25% of the white vote. In 1990 Young ran for Governor of Georgia. In both the primary and runoff he again got about one-fourth of the white vote, but running statewide where blacks are 27% of the population he was defeated. *Id.*

Only one black has ever been elected to Congress in this century from a majority white district in a non-covered southern state. Harold Ford, an African-American, was elected from the majority white Ninth District in the Memphis, Tennessee area in 1974. As a result of redistricting, the district now has a 54% black voting age population.

Given the failure of majority white districts to elect minority candidates, it is apparent that abolition of majority-minority districts would likely result in the elimination of most, if not all, of the African-American members of Congress from the South. The results in the rest of the country could be almost as dramatic. Of the 22 black members elected outside the South, only three were elected from majority white congressional districts. Elaine R. Jones, "In Peril: Black Lawmakers," *The New York Times*, Sept. 11, 1994, E19.

A pattern of minority office holding similar to that in Congress exists for southern state legislatures. Approximately 90% of all southern black legislators in the 1980s were elected from majority black districts. Handley, *supra*, in *Quiet Revolution* at 337. In Georgia, for example, of the 40 black members serving in the general assembly on January 1, 1994, only one was elected from a majority white district. Of the 31 black members of the Georgia house, 26 were elected from districts that were 60% or more black. Of the nine black members of the Georgia senate, eight were elected from districts that were 60% or

more black. Members of the Georgia General Assembly, Senate and House of Representatives, Second Session of 1993-1994 Term (1994); *Johnson v. Miller*, No. 194-008 (S.D. Ga.), Tr. Vol. IV at 237; Stipulations Nos. 61-63; J. Ex. 11; Abrams Exs. 23-24.[30]

While only one black was elected from a majority white legislative district in Georgia, whites won in 14 (25.9%) of the 54 majority black districts. Given this level of white success, though majority black districts undeniably provide blacks better electoral opportunities, they cannot be dismissed simply as "quotas" or political "ghettos" for minorities. *Busbee v. Smith, supra*, 549 F. Supp. at 507.

The number of black elected officials in Georgia grew from 3 in 1964 to approximately 500 in 1990, most of whom (88%) were elected to city and county offices. McDonald, *supra*, in *Quiet Revolution* at 89; Joint Center for Political and Economic Studies, *National Roster of Black Elected Officials* 10, 129 (1990). This increase can be "traced directly to the gradual demise of at-large elections and the implementation of single-member districts containing effective black voting majorities." McDonald, *supra*, in *Quiet Revolution* at 89-90. The conclusion is inescapable that a decline in the number of majority-minority

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[30] As might be expected, a similar pattern exists for counties in Georgia. In a recent study of the relationship between districting format and the election of African-Americans to county commissions in Georgia, Charles Bullock concluded that counties using at-large elections "lag far behind in the rate at which they elect black commissioners," and that "blacks elected in these counties [adopting district systems] won district rather than [at-large] seats." Charles S. Bullock, III, "Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans," 56 J. Pol. 1098, 1103-04 (1994).

districts would return Georgia, the South, and much of the rest of the nation to the days when legislative bodies were largely, or exclusively, white.

IV. Congress Has Sanctioned the Creation of Majority-Minority Districts

During the 1982 congressional hearings on the extension and amendment of the Voting Rights Act, opponents argued that the amendment of Section 2 would limit the political opportunities of minorities by allowing them "to become isolated" in single member districts, and would "prevent minority members from exercising influence on the political system beyond the bounds of their quota." *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 511 (statement of Dr. Edward J. Erler) and 1115 (statement of Robert M. Brinson) (1982) (hereinafter *Voting Rights Act Hearings*). Dissenting members of the Senate subcommittee similarly argued that adoption of a results standard for Section 2 would lead to the creation of majority-minority districts, or "political ghettos for minorities," and that while "[m]inority *representation* in the most primitive sense may be enhanced by the proposed amendment . . . minority *influence* would suffer enormously." S.Rep. No. 417, 97th Cong., 2d Sess. 103 (1982) (additional views of Sen. Orrin G. Hatch of Utah).

Congress weighed these arguments, but determined that minorities should be guaranteed the equal right to elect representatives of their choice, and that districting systems were an appropriate way of securing that right. According to the Senate report, the testimony and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of Section 2 would limit the political opportunities of minorities. *Id.*

at 31-32. The subcommittee found there was "an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." *Id.* at 32.

The principal decision on which the committee relied was *White v. Regester, supra,* invalidating multimember legislative districts on the ground that they diluted minority voting strength and requiring the adoption of single member districts to bring the minority community "into [the] full stream of political life of the county and State." *Id.* at 769, 773. In 1982 Congress adopted the legal standard for proving vote dilution established in *White v. Regester* as the "results test" of amended Section 2. *Gingles, supra,* 478 U.S. at 35.

The Senate report, moreover, provides that in implementing remedies for Section 2 violations, a

> court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S.Rep. No. 417, *supra,* at 31. One of the cases cited in the report as representing the "complete and full" remedy standard was *Kirksey v. Board of Supervisors,* 554 F.2d 139, 150-51 (5th Cir. 1977), in which the court rejected a proposed redistricting plan for a county board of supervisors because the two minority districts contained only "skin-of-the-teeth" black majorities, and therefore failed to provide blacks a "realistic opportunity" to elect representatives of their choice. The court also rejected the claim that an ameliorative plan "would be a racial gerrymander." *Id.* at 151.

In light of the legislative history and the language of the statute, the Court has consistently held that Section 2 guarantees the right "of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter, supra,* 113 S.Ct. at 1155. And where violations are established, Congress itself has determined that complete and full remedies, including majority-minority single member districts, may properly be implemented. *See Johnson v. De Grandy, supra,* 114 S.Ct. at 2661 ("society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity").

Congress also concluded that there was no factual basis for contending that majority-minority districts increased racial tensions or caused other harm. Critics of the 1982 amendment argued that a results standard for Section 2 would "deepen the tensions, fragmentation and outright resentment among racial groups," *Voting Rights Act Hearings, supra,* at 662 (statement of John H. Bunzel), would "pit race against race," *id.* at 745 (statement of Michael Levin), "would exacerbate, race consciousness," *id.* at 1250 (statement of Prof. Henry Abraham), "may well foster polarization," *id.* at 1328 (statement of Donald L. Horowitz), and would "compel the worst tendencies toward race-based allegiances and divisions." *Id.* at 1449 (letter from Prof. William Van Alstyne) (1982). Congress rejected these arguments on the ground that there was no evidence to support them, and concluded that the amendment would not "be a divisive factor in local communities by emphasizing the role of racial politics." S.Rep. No. 417, *supra,* at 31-2.

The decisions of district courts in the post-*Shaw v. Reno* redistricting cases do not contradict the findings of

Congress. In *Johnson v. Miller, supra,* for example, the three judge court concluded that "the plaintiffs suffered no individual harm; the 1992 congressional redistricting plans had no adverse consequences for these white voters." Slip op. at 32. In the present case, the district court acknowledged "the great benefits that are derived by an increase in minority representation in government," that "minorities have shown that they perform admirably," that they "provide positive role models for all black citizens," and that they "insure that the legal obstacles to minority advancement in all areas of life will be eliminated." App. at 21a. Far from polarizing the community or increasing tensions, non-dilutive redistricting plans are a necessary remedy for continuing racial bloc voting and confer a benefit on persons of all races.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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